
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: October 22, 1987
CASE NO. 85-ERA-15
[Editor's Note: The correct case number is 84-ERA-15]

STEVEN LOCKERT,
COMPLAINANT,

v.

PULLMAN POWER PRODUCTS CORP.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Administrative Law Judge (ALJ) Henry B. Lasky submitted a Recommended Decision and Order on Remand (R.D. and O.R.) to me on October 4, 1985, in this case arising under the Energy Reorganization Act of 1974, as amended (the Act), 42 U.S.C. § 5851 (1982). I had remanded this case to the ALJ on August 19, 1985, to reconsider the record in light of applicable law in the Ninth Circuit, the United States Court of Appeals circuit where this case arises, and in the Secretary's decisions on the scope of protected activities under the Act.

The entire record in this case has been reviewed and I agree with the ALJ's conclusion that Respondent did not violate the

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Act when it discharged Complainant in December 1983. With the exceptions discussed below, I think the ALJ adequately considered all of the issues raised by the parties in this case. He made his findings and reached his conclusions based on his evaluation of the evidence presented and his judgment of the credibility of the witnesses who testified

before him. The record supports the conclusions of the ALJ on the weight of the evidence and the credibility of witnesses.

The ALJ seems to have made conflicting findings as to whether Lockert carried his burden of proving, by a preponderance of the evidence, that retaliation for protected activity was a motivating factor in the decision to fire Lockert. *See Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163-1164 (9th Cir. 1984); *Dean Dartey v. Zack Company of Chicago*, 82-ERA-2, Decision and Final Order of the Secretary at 6-9 (April 25, 1983). On page four of the R.D. and O.R. for example, the ALJ said that Complainant's reports of discrepancies and Respondent's adverse reactions to these reports "itself is sufficient to support a finding that the Respondent had a retaliatory motive for discharging Complainant." But, in the same paragraph, the ALJ went on to say "[t]he burden thereafter shifted to the Respondent and detailed analysis is required to determine whether the termination of Complainant was motivated by [his] . . . protected conduct. . . ." Of course, the burden of proving by a preponderance of the evidence that retaliation for protected activities was a motivating factor in the employee's action always remains with the Complainant and never shifts to the Respondent. *Dean Dartey v. Zack Company of Chicago*, slip op. at 8.

On page eight of the R.D. and O.R., the ALJ found that "employee . . . has the burden of showing that the protected conduct was a motivating factor in the employer's decision to terminate him. Complainant has met his. burden, with circumstantial evidence." Later, on the same page, however, the ALJ held "I do not find that the . . . protected conduct was a motivating factor in the Respondent's decision to terminate him." But the ALJ went on to hold that "Respondent has shown by a preponderance of the evidence that Complainant would have been terminated for being absent from his authorized work place even in the absence of such protected conduct." R.D. and O.R. at 8.

After review of the record, I find that Complainant has

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not carried his burden of proving by a preponderance of the evidence that retaliation for protected activities was a motivating factor in Respondent's decision to fire him. To be sure, there is some evidence of retaliatory motive: a series of discrepancy reports of some serious apparent quality control problems in the three months just prior to Complainant's discharge; Complainant's testimony that he had an argument with Mr. Russ Nolle, Complainant's second line supervisor, on October 17, 1983, about being allowed to do research in welding industry codes when Mr. Nolle said "[y]ou have one foot out the door now;" statements by managers and supervisors that complainant was "a pain in the ass," that one supervisor was going to "get his [Complainant's] checks," that Complainant was in "hot water" for going outside his area of responsibility in referring to welding codes other than those in company manuals, that Complainant was delaying production and should be gotten rid of; and ambiguity over the extent of permission Complainant's

supervisor gave him on December 14, 1983, to do paper work before reporting to his work area to perform welding inspections.

On the other hand, there is considerable evidence to rebut an inference of retaliatory motive. Other inspectors filed more discrepancy reports than Complainant and there was testimony that Complainant's reports were not unusual. Hearing Transcript (T.) at 499. Company work rules explicitly said the penalty for unauthorized absence from one's work area is discharge. T. at 548. When Complainant was warned about being out of his work area on October 17, 1983, he concedes be had done so without permission or prior notification to his supervisors. T. at 544. (*See* further discussion of Complainant's argument on this issue below.) Mr. Nolle testified that his remark to Complainant on October 17, 1983, that "You have one foot out the door now" was related to Mr. Nolle's irritation about quality control inspectors, such as Complainant, not supporting the craft workers, T. at 544, and the ALJ found Mr. Nolle to be a credible witness. Another employee was suspended for a first offense of being absent from his work area without permission while Complainant was only warned. T. at 434. Around Thanksgiving 1983, Complainant was absent for three days without calling in, in violation of a work rule, but no action was taken against him. T. at 504.

In addition, Mr. Karner, the Field Quality Assurance and Quality Control Manager, testified about the importance of quality control inspectors being available to perform "in process"

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inspections for the craft workers, T. at 333, that he had discussed the problem of quality control inspectors being out of their work area without permission with Mr. Nolle several times prior to the October 17, 1983, incident, T. at 345-6, and the ALJ found Mr. Karner to be a credible witness. The managers and supervisors, other than Mr. Nolle, who made disparaging remarks about Complainant were not involved in the decision to fire him. T. at 137, 469. The only knowledge Mr. Karner had about Complainant's permission to do paperwork on the morning of December 14, 1983, was that it should have taken half an hour, but Complainant did not report to his work area for almost three hours. T. at 547. There was considerable confusion over who signed the termination notice, but it seems to have been just that and not an attempt to deceive or mislead, T. at 392. All of the conditions noted in Complainant's discrepancy reports were responded to by Respondent and either found not to be a problem or steps were taken to correct the problem. T. 360-378. Weighing all the evidence on the record, I find that Complainant did not carry his burden of proof.

Complainant contended in his brief before me that his discharge, based on a second offense of being away from his assigned work area, after having been warned the first time, was improper because the activity for which he had been warned was protected under section 5851. *See* R.D. and O.R. at 5. But the employee protection provision of the Act does not protect all whistleblowing and related activity (here, researching industry

codes) regardless of the context and the manner in which it is carried out. "[A]n employer may discharge employees who let protest activities interfere with their job performance." *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d at 1164.

Similarly, in interpreting the anti-retaliation provision of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a) (1982), the courts have said that the clause does not provide special protection to employees whose duties involve assuring employer compliance with the Civil Rights Act. "An employee does not receive special protection under Title VII simply because the employee handles discrimination complaints or works on affirmative action matters." *Holden v. Owens-Illinois Inc.*, 793 F.2d 745, 751 (6th Cir. 1986). Title VII does not protect an employee when he acts "contrary to the instructions of his employer," *id*. (*see also EEOC v. Crown Zellerbach Corp*., 720 F.2d 1008, 1015 (9th Cir. 1983); *Whatley v. Metropolitan Atlanta*

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Rapid Transit Authority, 632 F.2d 1325, 1329 (5th Cir. 1980); *Rosser v. Laborer's Int'l Union of North America*, 616 F.2d 221, 223 (5th Cir. 1980), *cert. denied*, 449 U.S. 886 (1980)), or when he "violates legitimate company rules, [or] knowingly disobeys company orders. . . ." *Unt v. Aerospace Corp*., 765 F.2d 1440, 1446 (9th Cir. 1985).

Here Complainant's supervisor issued the warning because Complainant was out of his work area and not supporting the craft workers by performing inspections. The ALJ credited the testimony of Complainant's supervisors as to the reason for the warning, and that finding is supported by the record. *See, e.g.*, T. at 543-545; 570-571. Thus, the warning for the first offense of being out of his work area was not improper, and could properly have formed the basis for discharge for a second offense by Complainant against the same instruction and work rule.

Accordingly, I adopt the recommendation of the ALJ and the complaint IS DENIED.

SO ORDERED.

WILLIAM E. BROCK
Secretary of Labor

Washington, D.C.